No. 15993

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GERTRUDE L. BRAWNER,

Appellant,

vs.

PEARL ASSURANCE COMPANY, LTD., *et al.*,

Appellee.

APPELLANT'S REPLY BRIEF.

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I.

Insuring Companies Cannot Escape Liability by Any Occurrence, or Transactions of Insured With Third Parties Subsequent to Loss.

Appellee, in its brief on page 14, quotes with favor a portion of the text from 45 C. J. S., Insurance Section 915, page 1010. Appellee conveniently omits the following pertinent portions of said text:

> "THE INSURER'S OBLIGATION OF LIABILITY UNDER A POLICY OF FIRE INSURANCE IS MEASURED AND DEFINED BY THE TERMS OF THE POLICY; THE INSURED IS ENTITLED TO RECOVER TO THE EXTENT OF HIS LOSS OCCASIONED BY THE FIRE, NOT EXCEEDING THE MAXIMUM AMOUNT STATED IN THE POLICY. The obligation or liability of an insurer under a policy of fire insurance is measured and defined by the terms of the policy, and cannot be enlarged or varied

> by judicial construction. . . . Also insurer's liability cannot exceed the maximum amount named in the policy. Speculative collateral questions should not be allowed to enter into the ascertainment of actual value; so insurer's liability is not affected by the fact that the insured had offered to sell the property for less than its actual value. The fact that the amount of loss cannot be determined without difficulty, or is to some extent a matter of estimate, does not affect insurer's liability or insured's right to compensation."

An examination of the terms of the policy in light of the above citation discloses the liability of the insured as therein set forth as follows, to wit [T-13]:

> "does insure . . . to the extent of the actual cash value of the property at the *time of loss* . . . against all loss by fire."

The "loss" mentioned in the insuring contract is defined in *Dubin Paper Co. v. Ins. Co. of North America,* 8 A. L. R. 2d 1393, 361 Pa. 68 at 91, 63 A. 2d at 96:

> "The loss the company contracts to remedy is the fire-created depletion of the insured's assets, and that is made up not by the erection of a duplicate of the building destroyed but by paying the insured its value in money. This liability the insuring companies cannot escape by anything any third party may later do for the insured's benefit." (See App. Op. Br. p. 18.)
>
> Cal. Ins. Code, Sec. 301;
>
> *Heidisch v. Globe & Rep. Ins. Co. of Am.,* 368 Pa. 602;
>
> 29 A. L. R. 2d p. 884.

II.

Interpretation of Contract.

The above quoted insuring provision from the fire policy here in question would certainly convey to the ordinary man, having such a policy, that it meant just what it said. He would have the right to understand that he was protected against fire loss at the time the fire occurred. He certainly would not be given to understand that the insuring provision was meant to operate so greatly to his disadvantage as to tend to defeat the protection for which he negotiated and paid for, by the happening of uncertain, unpredictable events occurring long after the fire, which might or might not occur, such as a sale of the property, or of its disposal through eminent domain proceedings or on the happening of any other similar event or transaction with a third party for the insured's benefit.

The insurer is bound to use such language as to make the conditions, exceptions, and provisions of the policy clear to the ordinary mind, and in case it fails to do so, any uncertainty, ambiguity or reasonable doubt should be resolved against it.

14 Cal. Jur. (Ins., Sec. 24), p. 444;

Fireman's Fund Insurance Company v. Globe Navigation Company (9 C. C. A.), 236 Fed. 618, 633;

Fritz v. Metropolitan Life Ins. Co., 50 Cal. App. 2d 570, 123 P. 2d 622, 626.

When the language employed in an insurance policy is ambiguous, or when a doubt arises in respect to the application, exceptions to, or limitations of, liability there-

under, they should be interpreted most favorably to the insured, or to the beneficiary to whom the loss is payable.

14 Cal. Jur. (Ins., Sec. 24), p. 445;

Glickman v. N. Y. Life Insurance Co., 16 Cal. 2d 626, 107 P. 2d 252, 256;

New York Life Insurance Company v. Eunice B. Hiatt, 140 F. 2d 752, 168 A. L. R. 551.

Appellee, on page 18 of its Brief, in an apparent attempt to bolster its untenable position, makes the following misstatement of facts, to wit:

> "For some time before and when the fire occurred she was bound to lose ownership of the property at the value determined or agreed upon in that action. *She saw fit to agree that the value was $26,400.00 before the fire and she accepted that in full payment.* It would seem of little importance when the agreement was dated, the important thing being that she agreed upon the value as of a time unaffected by the fire and received payment unaffected by the fire."

There is no evidence that Appellant at any time agreed that the value of the property *before* the fire was the sum of $26,400.00 or any sum, other than the sum of $75,000.00 as alleged in her Answer in the suit in Eminent Domain No. 658477. There is no evidence that Appellant at any time, before the fire, offered to accept a sum less than $75,000.00 for her property and any gratuitous statements by Appellee to the contrary are cunningly contrived by Appellee in an attempt to escape its obligation and are without foundation in fact and are untrue.

III.

Appellee's Exhibit "A" Is Incompetent and Its Admission in Evidence Prejudicial Error.

The papers and documents comprising Appellee's Exhibit "A" pages 3-4 of Appellee's Brief, are without exception concerning transactions occurring *subsequent* to the fire loss and between Appellant and a third party not a party to this proceeding. All of said documents and pleadings [Appellee's Ex. "A"] pertained only to property remaining in Appellant's hands subsequent to the fire. They could not possibly refer to non-existent property which had been destroyed by fire. They refer only to the real property and the improvements remaining thereon after the fire. They could not possibly refer to non-existent property but only to the property *actually* taken in said action by the County of Los Angeles, Condemnor Plaintiff.

Code Civ. Proc., Secs. 1249 and 1253;

Flood Control Dist. v. Andrews, 52 Cal. App. 788.

It is self evident that Appellee's Exhibit "A" concerns a third party not a party to this action and transactions occurring subsequent to the fire loss and is incompetent, irrelevant and immaterial and that its admission in evidence in this proceeding for Summary Judgment is highly prejudicial and erroneous. It affirmatively appears that said incompetent evidence mislead the trial court and induced the court to make an essential finding which is otherwise without support and would not have been made.

Appellee has at all times admitted liability, under its fire loss contract of insurance, for the payment of the loss of rentals caused Appellant by the fire and it follows that Appellant is entitled to judgment for this amount. Appellee's statement in its Brief on page 2 that it "tendered payment of the loss of rentals and the rental claim has been paid by Appellee and accepted by Appellant since the filing of this appeal" has no foundation in fact and is untrue.

Conclusion.

It is respectfully submitted that orders and judgment of the District Court should be reversed.

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By William H. Brawner,
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